

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

RICHARD LEWIS HUNTER, II	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. 2:14-CV-142
	§	
TEXAS ENERGY SERVICES, LP	§	
Defendants	§	

**DEFENDANT’S GENERAL MOTION TO DIMISS AND**  
**MOTION TO DISMISS UNDER RULE 12(b)(6)**

Defendant, TX Energy Services, LP moves this Court to dismiss this action and as reasons therefore shows the following:

**I. Summary of Argument**

Defendant moves this Court to dismiss Plaintiff’s causes of action against it for the reason that Plaintiff’s allegation of poverty is untrue. Defendant also moves this Court to dismiss specific claims against it – namely Plaintiff’s color and national origin discrimination claims as well as Plaintiff’s harassment claim since Plaintiff has failed to exhaust his statutorily required administrative remedies with respect to those claims.

**II. Procedural Background**

On April 18, 2014, Plaintiff apparently filed an Application to Proceed in District Court Without Prepaying Fees or Costs with the Western District Court of Texas – San Antonio Division. The application/motion was referred to Judge Henry J. Benporad who granted Plaintiff’s Motion to Proceed In Forma Pauperis on April 22, 2014.

On April 22, 2014, Plaintiff filed his Complaint which currently forms the basis of this lawsuit. On April 23, 2014 this case was transferred from the Western District – San Antonio

Division to the Southern District – Corpus Christi Division. On April 24, 2014 an Order was issued by this Court for an Initial Pretrial and Scheduling Conference along with an Order to Disclose Interested Persons.

On June 6 Plaintiff apparently filed a Motion for Service of Summons on Defendant and on June 4<sup>th</sup> an Order was issued referring this case to Magistrate Judge B. Janice Ellington. On June 6, 2014 an Amended Initial Pretrial and Scheduling Conference was entered by the Court.

None of the aforementioned pleadings, motions or orders have been served on Defendant. On July 7, 2014 Defendant received by certified mail from Plaintiff a copy the Order granting the Motion for Service of Summons along with the summons and Complaint filed back in April.

### **III. Defendant's Motion to Dismiss Plaintiff's Claims as Plaintiff's**

#### **Allegation of Poverty is Untrue**

As stated above, on April 18, 2014, Plaintiff filed an Application to Proceed in District Court Without Prepaying Fees or Costs which was granted by the Court on April 22<sup>nd</sup>. As part of the Application to Proceed in District Court Without Pre-paying Fees or Costs, Plaintiff provided the Court with information concerning Plaintiff's income. Specifically, on April 17, 2014, Plaintiff stated, in answering question no. 3 on the Application, that Plaintiff had no income from "business, profession or other self-employment" in the past twelve months.

This is untrue. It is simply undisputed that Plaintiff was *actively employed and earning wages* with Defendant continuously from April 17, 2013 until August 29 2013. Attached hereto as Exhibit "1" are Defendant's payroll records which reflect that Plaintiff received wages from April 17, 2013 until August 29, 2013 totaling \$21,584.92.

Under the Federal Rules of Civil Procedure with respect to proceeding in forma pauperis, "the Court shall dismiss the case at any time if the Court determines that . . . the allegation of

poverty is untrue.” 28 U.S.C. §1915(e)(2).<sup>1</sup> The Application to Proceed without prepaying fees or costs signed by Plaintiff on April 17, 2014 requires Plaintiff to identify all wages received in the past twelve months among other things. It is simply undisputed that Plaintiff received thousands of dollars in wages from Defendant through August of 2013 – well within the twelve month time period requested by the Court. Plaintiff’s allegation of poverty is obviously untrue notwithstanding Plaintiff’s declaration in the Application that: “I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.” Defendant moves this Court for dismissal of Plaintiff’s claims for submitting an allegation of poverty which is untrue and to award Defendant any and all other relief to which it may be justly entitled in this cause.

#### **IV. Defendant’s Motion to Dismiss Under Rule 12(b)(6) for Plaintiff’s Failure to State a Claim Upon Which Relief Can Be Granted**

Plaintiff’s Complaint alleges discrimination in violation of Title VII of the Civil Rights Act of 1964 based on race, retaliation, national origin, color and for harassment.

The charge of employment discrimination filed by Plaintiff in this case with the Equal Employment Opportunity Commission, however, only identifies discrimination on the basis of race and retaliation. The charge does not identify or mention discrimination on the basis of color or national origin and makes no mention of harassment. Exhibit “2.”

Title VII requires employees to exhaust their administrative remedies before seeking judicial relief. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 273 (5<sup>th</sup> Cir. 2000). It is well settled that Courts may not entertain claims brought under Title VII unless an aggrieved party has first exhausted his administrative remedies by filing a charge of discrimination with the

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<sup>1</sup> It should also be noted that beginning June 4 2014 Plaintiff also began receiving workers compensation benefits payments totaling \$27,249.45 and continues to receive regular workers compensation benefits to this day.



EEOC. See *Filer v. Donley*, 690 F.3d 643, 647 (5<sup>th</sup> Cir. 2012); *McClain* 519 F.3d at 273; *Taylor v. Books A Million*, 296 F.3d 376, 378-79 (5<sup>th</sup> Cir. 2002, cert. denied 537 U.S. 1200, 123 S.Ct. 1287, 154 L.Ed.2d 1041 2003); *Randel v. U. S. Dept. of Navy*, 157 F.3d 392, 395 (5<sup>th</sup> Cir. 1998). While not uniformly viewed as a jurisdictional prerequisite, the filing of an EEOC charge is “a precondition to filing in district court.” *Taylor*, 296 F.3d at 379 (quoting *Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5<sup>th</sup> Cir. 1996).

The primary purpose of the EEOC charge is to provide notice to the Respondent of the discrimination alleged and to activate the voluntary compliance and conciliation functions of the EEOC. See *Manning v. Chevron Chemical Co.*, 332 F.3d 874, 878 (5<sup>th</sup> Cir., cert. denied 540 U.S. 1107, 124 S.Ct. 1060, 157 L.Ed.2d 892 2004). Requiring the Plaintiff to first state his allegations of employment discrimination in an EEOC charge serves Congress’ “intention to promote conciliation rather than litigation in the Title VII context.” *Burlington Industries, Inc. v. Ellereth*, 524 U.S. 742, 764, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Accordingly, the scope of the complaint is limited to the “discrimination stated in the charge itself or developed in the course of a reasonable [EEOC] investigation of that charge.” *National Association of Governmental Employers v. City Public Service Board*, 40 F.3d 698, 712 (5<sup>th</sup> Cir. 1994)(quoting *King v. Seaboard Coastline Railroad Co.*, 538 F.2d 581, 583 (4<sup>th</sup> Cir. 1976)). Therefore, the failure to assert a claim of discrimination in an EEOC charge and/or its lack of development in the course of a reasonable investigation of that charge precludes the claim from later being brought in a civil suit. See *Thomas v. Texas Department of Criminal Justice*, 220 F.3d 389, 395 (5<sup>th</sup> Cir.2000); *National Association of Governmental Employers*, 40 F.3d at 711-12; *Young v. City of Houston*, 906 F.2d 177, 179 (5<sup>th</sup> Cir. 1990).

In this case, it is simply undisputed that Plaintiff's EEOC charge does not allege or even mention discrimination on the basis of color or national origin and makes no allegation of harassment. Accordingly, Plaintiff has failed to exhaust his statutorily required administrative remedies and Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests the Court to dismiss Plaintiff's claims against Defendant and to award such other and further relief both at law and in equity to which Defendant may be justly entitled.

Respectfully submitted,

HOLLAND & HOLLAND, L.L.C.  
North Frost Center  
1250 N.E. Loop 410, Ste. 808  
San Antonio, Texas 78209  
Telephone: (210) 824-8282  
Facsimile: (210) 824-8585

BY 

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Michael L. Holland  
State Bar No. 09850750  
Southern District Bar No. 83742  
Email: mholland@hollandfirm.com  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

A true and correct copy of the above and foregoing instrument has been properly delivered pursuant to the Federal Rules of Civil Procedure, on the 23rd day of July, 2014, to the following counsel of record:

Richard Lewis Hunter, II, pro se  
6202 Roxbury Rd., Apt. #3304  
San Antonio, Texas 78238



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Michael L. Holland

**AFFIDAVIT OF MARICELA MARTINEZ**

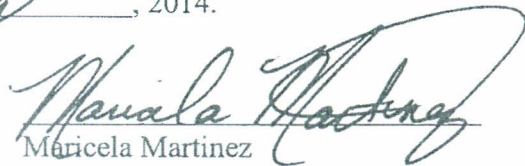
STATE OF TEXAS           \*  
                                      \*  
COUNTY OF JIM WELLS   \*

Before me, the undersigned notary public, on this date personally appeared Maricela Martinez, who is personally known to me, who being by me duly sworn according to law and upon her oath deposes and states:

1. "My name is Maricela Martinez. I am over 18 years of age and I am competent to make this affidavit. I have personal knowledge of the facts recited herein and said facts are true and correct.
2. I am the Director of Human Resources and Payroll Operations for TX Energy Services, LP.
3. In my capacity as the Director of Human Resources and Payroll Operations, I have access to payroll information regarding current and former employees.
4. I have reviewed the TX Energy Services, LLC Check Registry Report records concerning Mr. Richard L. Hunter II (2 pages printed on July 23, 2014) attached to this affidavit and affirm they are true and correct copies of excerpts of payroll records made at or near the time of the work performed and kept in the regular course of business.


Further, Affiant sayeth not.

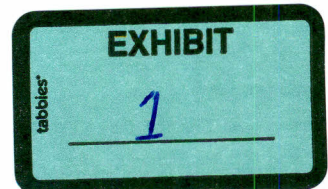
Executed this 23 day of July, 2014.

  
Maricela Martinez

SUBSCRIBED AND SWORN TO before me by the said Maricela Martinez, on this the 23 day of July, 2014.



  
NOTARY PUBLIC, STATE OF TEXAS





System: 7/23/2014 9:20:04 AM  
 User Date: 7/23/2014

TX Energy Services, LLC  
 CHECK INQUIRY REPORT  
 U.S. Payroll

Page: 1  
 User ID: mlongoria

Employee ID: TES-004634 Hunter II, Richard L.

Ranges: From: To:  
 Check Number First Last  
 Check Date First Last  
 Audit Trail Code First Last

Sorted By: Check Date

\* Voided

Check Number	Payment#	Checkbook ID	Check Date	Audit Trail Code		
Gross Wage	Federal Tax	FICA Soc Sec Tax	FICA Med Tax	Deductions	Benefits	Net Wages
Federal Tax/Tips	FICA Soc Sec/Tips	FICA Med/Tips	Uncltd FICA SS/Tips	Uncltd FICA Med/Tips	Reason for Voiding	
112205	157010	REGIONS PAYROLL	3/29/2013	UPRCC00001503		
\$1,691.63	\$171.53	\$104.88	\$24.53	\$0.00	\$0.00	\$1,390.69
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
112654	158160	REGIONS PAYROLL	4/12/2013	UPRCC00001519		
\$1,990.63	\$216.38	\$123.42	\$28.86	\$0.00	\$0.00	\$1,621.97
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00089698	159195	REGIONS PAYROLL	4/26/2013	UPRCC00001529		
\$1,586.00	\$155.69	\$98.33	\$23.00	\$25.00	\$0.00	\$1,283.98
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00090407	160260	REGIONS PAYROLL	5/10/2013	UPRCC00001536		
\$2,107.63	\$233.93	\$130.68	\$30.56	\$25.00	\$0.00	\$1,687.46
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00091103	161340	REGIONS PAYROLL	5/24/2013	UPRCC00001541		
\$1,922.38	\$206.15	\$119.18	\$27.87	\$25.00	\$0.00	\$1,544.18
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00091810	162922	REGIONS PAYROLL	6/7/2013	UPRCC00001575		
\$1,571.38	\$153.50	\$97.43	\$22.79	\$25.00	\$0.00	\$1,272.66
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00092524	163994	REGIONS PAYROLL	6/21/2013	UPRCC00001581		
\$2,244.13	\$254.41	\$139.13	\$32.54	\$25.00	\$0.00	\$1,793.05
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00093234	165002	REGIONS PAYROLL	7/5/2013	UPRCC00001584		
\$2,005.25	\$194.71	\$114.46	\$26.77	\$185.14	\$0.00	\$1,484.17
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00095356	168098	REGIONS PAYROLL	7/19/2013	UPRCC00001592		
\$910.00	\$0.00	\$46.56	\$10.89	\$185.14	\$0.00	\$667.41
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00096059	169096	REGIONS PAYROLL	8/2/2013	UPRCC00001602		
\$1,600.63	\$0.00	\$89.37	\$20.90	\$185.14	\$0.00	\$1,305.22
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00096744	170138	REGIONS PAYROLL	8/16/2013	UPRCC00001612		
\$1,644.50	\$0.00	\$92.10	\$21.54	\$185.14	\$0.00	\$1,345.72
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		
DD00097461	171248	REGIONS PAYROLL	8/30/2013	UPRCC00001627		
\$1,727.38	\$0.00	\$97.23	\$22.74	\$185.14	\$0.00	\$1,422.27
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		



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 User Date: 7/23/2014

TX Energy Services, LLC  
 CHECK INQUIRY REPORT  
 U.S. Payroll

Page: 2  
 User ID: mlongoria

Employee ID: TES-004634 Hunter II, Richard L.

\* Voided

Check Number	Payment#	Checkbook ID	Check Date	Audit Trail Code
Gross Wage	Federal Tax	FICA Soc Sec Tax	FICA Med Tax	Deductions
Federal Tax/Tips	FICA Soc Sec/Tips	FICA Med/Tips	Uncltd FICA SS/Tips	Uncltd FICA Med/Tips
DDG0098183	172295	REGIONS PAYROLL	9/13/2013	UPRCC00001637
\$583.38	\$0.00	\$26.30	\$6.15	\$185.14
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
\$21,584.92	\$1,586.30	\$1,279.07	\$299.14	\$1,235.84
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00

Total Checks: 13

**AFFIDAVIT OF MICHAEL HOLLAND**

STATE OF TEXAS           \*  
                                     \*  
COUNTY OF BEXAR       \*

Before me, the undersigned notary public, on this date personally appeared Michael Holland, who is personally known to me, who being by me duly sworn according to law and upon his oath deposes and states:

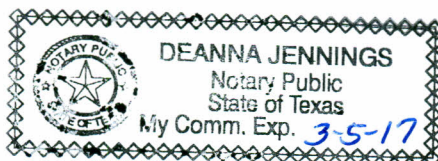
1. "My name is Michael Holland. I am over 18 years of age and I am competent to make this affidavit. I have personal knowledge of the facts recited herein and said facts are true and correct.
2. I am the attorney of record for the Defendant, TX Energy Services, LP, in this lawsuit.
3. The EEOC charge attached to Defendant's Motion to Dismiss Rule 12(b)(6) is a true and correct copy from my file of the charge Plaintiff signed on September 9, 2013 and filed with the Equal Employment Opportunity Commission (charge #451-2013-02967).

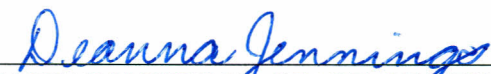
Further, Affiant sayeth not.

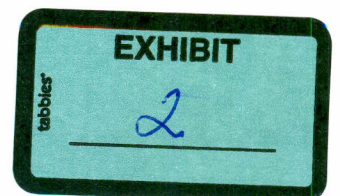
Executed this 23<sup>rd</sup> day of July, 2014.


  
\_\_\_\_\_  
Michael Holland

SUBSCRIBED AND SWORN TO before me by the said Michael Holland, on this the 23<sup>rd</sup> day of July, 2014.



  
\_\_\_\_\_  
NOTARY PUBLIC, STATE OF TEXAS



<b>CHARGE OF DISCRIMINATION</b> This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.		Charge Presented To: Agency(ies) Charge No(s): <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> FEPA  <input checked="" type="checkbox"/> EEOC         </div> <div style="text-align: right;">451-2013-02967</div> </div>	
<b>Texas Workforce Commission Civil Rights Division</b> and EEOC State or local Agency, if any			
Name (indicate Mr., Ms., Mrs.) <b>Mr. Richard L. Hunter, Jr.</b>		Home Phone (Incl. Area Code) <b>(615) 720-1093</b>	Date of Birth <b>10-23-1978</b>
Street Address City, State and ZIP Code <b>6202 Robury Road #3304, San Antonio, TX 78238</b>			
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name <b>TEXAS ENERGY SERVICE INC.</b>		No. Employees, Members <b>201 - 500</b>	Phone No. (Include Area Code) <b>(361) 786-2390</b>
Street Address City, State and ZIP Code <b>1214 Highway 72, Three Rivers, TX 78071</b>			
Name		No. Employees, Members	Phone No. (Include Area Code)
Street Address City, State and ZIP Code			
DISCRIMINATION BASED ON (Check appropriate box(es).) <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"><input checked="" type="checkbox"/> RACE</div> <div style="width: 50%;"><input type="checkbox"/> COLOR</div> <div style="width: 50%;"><input type="checkbox"/> SEX</div> <div style="width: 50%;"><input type="checkbox"/> RELIGION</div> <div style="width: 50%;"><input type="checkbox"/> NATIONAL ORIGIN</div> <div style="width: 50%;"><input checked="" type="checkbox"/> RETALIATION</div> <div style="width: 50%;"><input type="checkbox"/> AGE</div> <div style="width: 50%;"><input type="checkbox"/> DISABILITY</div> <div style="width: 50%;"><input type="checkbox"/> GENETIC INFORMATION</div> <div style="width: 50%;"><input type="checkbox"/> OTHER (Specify)</div> </div>		DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest <b>06-07-2013 08-22-2013</b> <input checked="" type="checkbox"/> CONTINUING ACTION	
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)): <p>While employed by Texas Energy Services Inc., I have been subjected to a hostile and harassing work environment by management personnel and coworkers. I was the only Black working at the Three Rivers site at the wash rack.</p> <p>On June 8, 2013, a Hispanic coworker called me a nigger and pulled a blade on me after I stood up for myself and asked why he was harassing and treating me the way he was. The coworker is a good friend of my supervisor. I reported the incident to dispatch and had to complete a written statement. The next morning I met with the general manager and we discussed the issue.</p> <p>On July 30, 2013 I had a dinner interview and preliminary job offer for a position in sales at the corporate location in Houston, TX. I was asked if there was anything else I wanted to bring up so I discussed the incident on June 8, 2013 and how I was being harassed and mistreated at work.</p> <p>On August 7, 2013 I had made pay request of \$80,000 annually based on market research.</p> <p>On August 9, 2013, out of the blue I had a meeting with the corporate attorney, the general manager, and the general manager's son. I was not expecting or informed about the meeting previously. During the meeting we discussed the June 8, 2013 incident and how I was being treated and harassed at work.</p>			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY - When necessary for State and Local Agency Requirements	
I declare under penalty of perjury that the above is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT	
Sep 09, 2013 Date		SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)	
 Charging Party Signature			



## CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

☐ FEPA☒ EEOC

451-2013-02967

## Texas Workforce Commission Civil Rights Division

and EEOC

State or local Agency, if any

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

On August 10, 2013 Michelle White informed me that the company was offering \$49,000 annually with the potential to make more. I stated that I would accept the offer. Ms. White told me she would get back with me the following Monday with a job offer, but she never did.

From August 11, 2013 on Ms. White kept telling me due to the disparity in the pay I was requesting and what the company was offering, I would not be happy with a salary of \$49,000 and I would not be a good fit. I told Ms. White I willingly accepted their offer of \$49,000 and just wanted to be given a chance. Ms. White stated she would reconsider hiring me for the position.

On August 22, 2013 I was notified by telephone by Ms. White that due to the disparity between what I had asked for and what the company was offering I would not be a good fit and would not be happy, despite me stating repeatedly that I was willing to work for \$49,000.

I believe that the pay disparity was being used as a pretext to not promote me. I had been offered the position in Houston, TX, but after I informed corporate about how I was being treated and harassed at work because of my race, the offer was pulled.

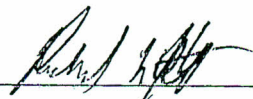
I believe that I have been and continue to be discriminated against because of my race, Black and retaliated against for making a protected complaint in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Sep 09, 2013

Date



Charging Party Signature

NOTARY – When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE  
(month, day, year)



UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

RICHARD LEWIS HUNTER, II  
Plaintiff,

vs.

TEXAS ENERGY SERVICES, LP  
Defendants

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§

CIVIL ACTION NO. 2:14-CV-142

**ORDER GRANTING DEFENDANT'S GENERAL MOTION TO DISMISS  
AND MOTION TO DISMISS UNDER RULE 12(b)(6)**

On this day came on to be considered Defendant, TX Energy Services, LP's Motion to Dismiss and Motion to Dismiss under Rule 12(b)(6). The Court having considered the motion, response and evidence presented is of the opinion that Defendant's motion is well taken, and should be, in all things, GRANTED. Accordingly, it is hereby:

ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint against Defendant TX Energy Services, LP is hereby dismissed with prejudice to refiling and Plaintiff shall have and take nothing against Defendant. All relief not expressly granted is hereby denied.

SIGNED AND ENTERED this \_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE